

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

ERNESTO CABRALES,)	Case No. 4:03 CR 60
)	
Petitioner,)	Judge Dan Aaron Polster
)	
vs.)	<u>MEMORANDUM OF OPINION</u>
)	<u>AND ORDER</u>
UNITED STATES OF AMERICA,)	
)	
Respondent.)	

Before the Court is the *Pro Se* Petitioner Ernesto Cabrales' Motion for Writ of Audita Querela (**Doc #: 86**). On September 8, 2003, Petitioner was sentenced to ten years imprisonment for a drug trafficking conviction pursuant to 21 U.S.C. §§841, 846 and a consecutive sentence of five years for violating 18 U.S.C. §924(c). Petitioner has filed a Motion for Writ of Audita Querela to have his sentenced reduced pursuant to *United States v. Whitley*, 529 F.3d 150 (2d Cir. 2008), and *United States v. Almany*, 598 F.3d 238 (6th Cir. 2010).

The proper mechanism for Petitioner to challenge his sentence is a habeas corpus petition under 28 U.S.C. §2255, which has a one-year statute of limitations. Treating Petitioner's Motion for Audita Querela as a §2255 motion, Petitioner's motion must be denied because the statute of limitations has run. Petitioner's motion was not filed within one-year of

his conviction becoming final nor has it been filed within one-year of the Supreme Court newly recognizing a right. *See* 28 U.S.C. §2255. Petitioner has not even identified a right newly recognized by the Supreme Court that could serve as the basis of his motion. His reliance on *Whitley* and *Almany* is inapposite because they are circuit court cases which do not address a right established by the Supreme Court. Accordingly, Petitioner's motion (**Doc #: 86**) is hereby **DENIED**.

IT IS SO ORDERED.

/s/ Dan A. Polster October 12, 2010
Dan Aaron Polster
United States District Judge